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JOHN T. FEY, Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1956.

No. 242

JAMES F. SEXTON,

Petitioner,

vs.

ELEANORE M. BARRY,
J. FRANK POLLOCK,
Judge, Probate Court of Lake County,
THE STATE OF OHIO,
THE COURT OF PROBATE, LAKE COUNTY,
CARL V. WEYGANDT,
Chief Justice, Supreme Court of Ohio,
THE STATE OF OHIO,
THE SUPREME COURT OF THE STATE OF OHIO,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
for the Sixth Circuit.

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THE STATE OF OHIO,
THE SUPREME COURT OF THE STATE OF OHIO,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals for the Sixth Circuit.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in the above-entitled case on April 18, 1956.

OPINIONS BELOW.

The memorandum opinion of the District Court is unreported and is printed on pages 52a and 53a of the appendix record, nine additional copies of which are filed herewith. The opinion of the United States Court of Appeals is unreported and is printed in Appendix B hereto, pp. 30-39.

JURISDICTION.

The judgment of the United States Court of Appeals was entered on April 18, 1956 (Appendix C, p. 40). The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254(1).

QUESTIONS PRESENTED.

1. Whether a District Court of the United States, pursuant to the provisions of Title 28, Section 1343, U. S. C., has jurisdiction over a conspiracy admitted for purposes of a motion to dismiss entered into by a State Judge and having as one of its purposes an interference with the appellate processes of the State in which the proceedings are then pending.

2. Whether a District Court of the United States having jurisdiction over such a conspiracy has power pursuant to the provisions of Section 2283, Title 28, U. S. C., to issue an injunction against the courts of a State during pendency of litigation in the State Courts.

3. Whether pursuant to the provisions of the Fourteenth Amendment to the United States Constitution a litigant has had due process of law where it is conceded for purposes of a motion to dismiss that the State Judge originally responsible for proceedings in his Court was at all times a biased and prejudiced Judge; and where, in its reference to usual practice under Ohio law, the Circuit Court of Appeals herein notes the fact of the resignation which had been conceded by brief and thereby establishes dicta in its opinion adjudicating in a manner adverse to said State Judge the actual fact of prejudice.

4. Whether the entering into a conspiracy on the part of a State Judge, as opposed to mere judicial disqualification, is such fraud as will render all judgment in the State Courts void for purposes of suit in the Courts of the United

States when such suit is instituted pursuant to the provisions of the Fourteenth Amendment to the United States Constitution and when such suit is further instituted in accordance with statutes conferring jurisdiction upon the District Courts of the United States.

5. Whether the action of a State Judge under the circumstances of judicial disqualification herein constitutes fraud rendering judgment in the State Courts subject to a collateral attack in a District Court of the United States.

6. Whether the Courts of the United States are bound by the decision of a State Court where suit is instituted in the United States Courts seeking to enjoin the State Court from rendering a decision and where the State Court rendering said decision has knowledge of the suit for injunction through service of process and further at the time of rendering its decision is a defendant in the injunctive action.

7. Whether in a collateral attack this Court has power to follow a procedure similar to that of recalling its Mandate and on its own motion has further the power to remand the original case to the State Supreme Court for further proceedings pending outcome of the federal end of the litigation.

8. Whether the petitioner is entitled to an injunction in the District Court under the circumstances herein.

STATUTES INVOLVED.

The constitutional provision involved is the Fourteenth Amendment to the Constitution of the United States of America. The statutes involved are Title 28, Section 1343, U. S. C.; Title 28, Section 2283, U. S. C.; and Title 42, Sections 1983-1985, U. S. C. They are printed in Appendix A, *infra*, pp. 27-29.

STATEMENT OF THE CASE.

Petitioner sought in the United States District Court to obtain an injunction against the Courts of the State of Ohio on the ground that a State Probate Judge by conspiracy and interference with the appellate processes had denied petitioner valuable constitutional rights, including denial of a fair and complete hearing in an action then pending in the Ohio Supreme Court.[1] The jurisdiction of the District Court was invoked pursuant to the provisions of 28 U. S. C. Section 1343, conferring jurisdiction upon the District Court in cases originating out of the Civil Rights Act, Title 42, Sections 1983-1985. The issues in the cause arise out of motions to dismiss filed in the District Court. These motions contended in the alternative that the courts of a State could not be enjoined in any event and that petitioner had not been denied such due process as would confer jurisdiction upon the District Court. The District Court limited its decision to the injunctive aspect of the case and held that a District Court cannot enjoin the courts of a State during pendency of suit in the state courts. In thus limiting its decision (52a-53a) the District Court in effect also held that on the face of the complaint this petitioner had been denied valuable constitutional rights. The Circuit Court sustained as to the injunction and then claimed further that due process had been accorded to the petitioner. In this latter regard, the Circuit

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[1] Although the Ohio Supreme Court was served with process, it subsequently rendered a decision in the State proceedings. Certiorari from that decision was sought in this Court, *Sexton v. Barry*, Case No. 228, Oct. Term, 1955, which was denied, 350 U. S. 838 (1955). In view of the arguments made therein by respondent Barry in opposition to certiorari, that denial is interpreted herein now to be to the petitioner's benefit.

In respect thereto, petitioner further notes that he has not requested return of the record therein, which includes the 754 page Bill of Exceptions, reference to which is had hereafter.

Court's opinion, Appendix B, *infra*, pp. 30-39, is contradictory in many ways. It is particularly contradictory in stating that due process can be had before a biased and prejudiced Judge.[2] In respect to the State proceedings, the Ohio Supreme Court subsequent to institution of this action rendered a decision in the very suit which this action sought to enjoin. In this regard, the Ohio Supreme Court was served with process. The reasons why that decision, as reported in 163 Ohio St. 124, is a nullity as far as the instant proceedings are concerned will become readily apparent upon a consideration of this entire petition.

The instant cause was commenced on December 17, 1954, when petitioner, a citizen of the United States, filed his complaint naming five defendants: (1) Eleanore M. Barry; (2) J. Frank Pollock, Probate Judge, Lake County, Ohio; (3) The Court of Probate, Lake County, Ohio; (4) Carl V. Weygandt, Chief Justice, the Supreme Court of Ohio; and (5) The Supreme Court of the State of Ohio (3a).[3] The complaint sought only an injunction (11a-12a). Of the defendants named, Eleanore M. Barry was also a party in the State proceedings. The State proceedings concern the disposition of assets in the estate of Patrick Sexton, who in his last will and testament gave the use and income from personal and real property to two daughters, Ellen and Elizabeth Sexton, during their lifetime, with remainder over to children and grandchildren as designated in the will upon the death of the survivor of the life beneficiaries. The life beneficiaries assumed legal title to the remainder personal assets, and since the equi-

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[2] It is also contradictory in stating that petitioner's grievance is that a case had been lost, because at the time of institution of this suit petitioner was the prevailing party in the Ohio Courts.

[3] The "a" references are to the appendix record filed in the Circuit Court of Appeals. Nine additional copies of this appendix record have been filed in this Court together with this petition.

table title belonged to other than them they were trustees of these assets. Of the two life beneficiaries, Ellen died in 1937 and Elizabeth in 1953. After the death of Elizabeth, the Lake County Probate Court in 1953 transferred the realty in the estate (Pl. Ex. 3, 46a-48a), and this litigation results from moneys in respondent Barry's possession which this petitioner contends belong to the estate and all of its legatees. The respondent Barry is a resident of Lake County, Ohio, as were Ellen and Elizabeth with whom she lived, they in turn being her aunts, with respondent Barry being the 1937 administratrix in the Ellen Sexton estate. The federal action is here concerned with whether petitioner had due process of law in the State proceedings, as opposed to conspiracy, bias, prejudice and interference with appellate processes.

Insofar as this action is particularly concerned, the material allegations of the complaint state that petitioner instituted discovery proceedings in the Probate Court of Lake County, Ohio; that the purpose of these proceedings was to effect a recovery of assets in the possession of Eleanore M. Barry (4a), respondent herein. The Lake County Probate Court duly entertained jurisdiction and hearing was had before the Honorable J. Frank Pollock, also a respondent herein. After a six day hearing presumably on the merits, the respondent Probate Judge thereupon decided that he did not have jurisdiction to hear the cause which he already had heard (4a-5a). Appeal was taken immediately to the Court of Appeals, Seventh Judicial District, Ohio, and that Court reversed the respondent Judge Pollock's decision, the Ohio Court of Appeals holding in effect that respondent Judge Pollock had jurisdiction and power to hear the discovery proceedings (5a). Prior to this reversal, the respondent Judge Pollock in

combination with respondent Barry's Painesville attorneys had endeavored to kill the 754 page Bill of Exceptions containing evidence of the jurisdictional facts alternatively upon which the reversal was based. As a result of that effort, and in order to get the Bill of Exceptions into the Ohio Court of Appeals, petitioner had to file in the Court of Appeals a motion directed to respondent Judge Pollock's conduct. This motion is identified in the complaint as Plaintiff's Exhibit "1" and is incorporated by reference into the complaint (par. 5, 5a; Pl. Ex. 1, 13a-18a). In addition to tracing in that motion the respondent Judge Pollock's conduct in respect to the Bill of Exceptions, the petitioner also quoted in the motion a letter previously received from opposing counsel in the cause. **That letter is on pages 15a and 16a of the appendix record and speaks for itself. That letter is so damaging that respondent Barry has been most careful throughout these entire proceedings to avoid entirely any reference to the letter even though it was written by her own attorney.** The letter in short quotes the respondent Judge Pollock and commits him to the existence of an estate, as did the six day trial and the 754 page Bill of Exceptions. That letter is also one of the reasons as to why the respondent Judge Pollock resigned when an affidavit of prejudice was to be filed subsequently against him, a resignation which will be discussed more later.

Upon reversal of respondent Judge Pollock's jurisdiction decision, this petitioner had become the prevailing party in the Ohio Courts. Although the respondent Judge Pollock's conduct was subject to criticism prior to reversal of his November 14, 1953 decision, the events that occurred subsequent to the reversal were to consolidate the present cause of action and the proof in clear and con-

vincing fashion. This was the result of two fiduciary applications which had been filed in the estate.

As the complaint points out, the reversal was journalized on May 24, 1954, and on that same date a Mandate issued to respondent Judge Pollock's Probate Court (5a). Subsequent to issuance of the Mandate and within the time for appeal from the judgment of reversal, a hearing was held before the respondent Judge Pollock relative to these two fiduciary applications, one for appointment of a successor trustee and the other for appointment of an administratrix de bonis non. This hearing was had on June 9, 1954. On that same day respondent Barry filed a Notice of Appeal to the Supreme Court of the State of Ohio, conditioned on the allowance by said Supreme Court of a motion to certify from the Court of Appeals the record in the discovery proceedings. Thereupon the respondent Judge Pollock in disregard of the Mandate, and in behalf of respondent Barry, opponent to the fiduciary applications, dismissed the one application for a successor testamentary trustee and continued the application for an administrator de bonis non, thus denying to the estate all benefit of a fiduciary pending the appeal (5a-6a). The respondent Judge Pollock did this even though the laws of the State of Ohio, Section 2113.15, Ohio Revised Code, make specific provision for appointment of a fiduciary pending outcome of litigation involving probate actions (9a).

In denying the appointment of a fiduciary, the respondent Judge Pollock for the second time was aiming his effort at killing the 754 page Bill of Exceptions, because Section 2505.32, Ohio Revised Code, permits a fiduciary in the estate to waive the printing of a record in the Ohio Supreme Court (9a-10a). That the right affected was substantial is evident from what

the respondent Barry did in the Ohio Supreme Court. The record filed by her was short-form and further it was erroneous. It had as its purpose a by-passing of facts pertinent to be determined by the Ohio Supreme Court as to the jurisdictional issue in the case. In the Ohio Supreme Court, regardless of whose responsibility it was to print the Bill of Exceptions, the appointment of a fiduciary in the estate would have permitted the joinder of the fiduciary as a party and would have permitted the fiduciary to have brought up the entire Bill of Exceptions without cost and as a matter of right into the Ohio Supreme Court thus automatically to correct the erroneous record filed by Respondent Barry (9a-10a). The respondent Judge Pollock on the face of the complaint herein did not want a fiduciary in the estate because he did not want the 754 page Bill of Exceptions as a record to be considered by the Supreme Court of Ohio on the issue of probate jurisdiction. For that reason, and because of the importance of the 754 page Bill of Exceptions to the jurisdictional issue to be determined by the Ohio Supreme Court, the complaint in this case is so framed that even if the Ohio Supreme Court were correct in deciding 163 Oh. St. 124 on the record then before that court this petitioner still had been denied due process of law in the Ohio Courts under the circumstances herein, and it was in this background that an affidavit of bias and prejudice was then filed against the respondent Judge Pollock. In this regard, respondent Judge Pollock's course of conduct had become such that the prejudice was now susceptible to proof on the basis of very specific charges the establishment of which presents very obvious evidence of conspiracy, and such is the allegation of the complaint (11a). In this regard, also, as has heretofore been pointed out, this the District Court recognized through the

mere expedient of limiting its decision to the injunctive aspect of the case.

The affidavit of prejudice was filed on June 14, 1954. As the result of the affidavit of prejudice, a correspondence was then had by and between this petitioner, Justice Weygandt of the Ohio Supreme Court and the respondent Judge Pollock. This correspondence also was made a part of the complaint and is contained in Exhibit "2" therein (6a-7a; Pl. Ex. 2, 22a-34a). As a result of this correspondence and also as a result of the affidavit of bias and prejudice, the respondent Judge Pollock on August 3, 1954 entered his resignation from the estate and trust. The circumstances of this resignation were to present still further cause for complaint about Judge Pollock's conduct. The resignation of Judge Pollock was permitted through a withdrawal of the affidavit of prejudice entered on August 2, 1954. The withdrawal of the affidavit was made at the suggestion of the respondent Justice Weygandt. Presumably this would have permitted a new Judge to enter the case and proceed with any matters then pending in the Lake County Probate Court. One of the matters then pending was a restraining order action against respondent Barry. The hearings to be conducted by the incoming Judge assumed, of course, that the new Judge would proceed upon an impartial basis. This could best be accomplished by the respondent Judge Pollock's entering an impartial journal entry of resignation, and the correspondence resulting in the withdrawal of the affidavit of prejudice was very specific in its understanding that the journal entry of resignation was to be entirely impartial. The respondent Judge Pollock, however, realizing the impact of the affidavit and the dishonorable circumstances under which he was compelled to resign then in a last final effort to protect himself took the liberty to violate the intent of

the correspondence. The journal entry was not impartial and it violated to the prejudice of this petitioner a very specific understanding reached by the correspondence which effected a withdrawal of the affidavit of prejudice (6a-7a). In this respect, it may here be noted that the very journal entry filed by the respondent Judge Pollock proved the fact of prejudice because in his very effort to displace responsibility in his journal entry he himself raised immediately a question as to why the resignation was necessary, a point which apparently was so well appreciated by the attorneys for the respondent Eleanore M. Barry that they were forced to admit in the District Court that he entered his resignation because in effect he was biased and prejudiced in fact.

After Judge Pollock's resignation, entered under the above circumstances, the Honorable Windsor R. Kellogg, Judge of the Common Pleas Court, Medina, Ohio, was assigned to sit in the Lake County Probate Court to hear matters then pending in the estate and trust of Patrick Sexton. At this hearing, Judge Pollock's violation of the correspondence resulting in the withdrawal of the affidavit of bias and prejudice was directed to Judge Kellogg's attention. As a result of petitioner's raising an objection to Judge Kellogg's right to proceed until the journal entry of resignation had been changed to be impartial, Judge Kellogg continued all proceedings in the estate and trust, with petitioner reserving his objections to the journal entry filed by Judge Pollock on August 3, 1954 (7a-8a). This objection was formalized in the Lake County Probate Court by Plaintiff's Exhibit "2" which contained therein the correspondence which Judge Pollock and Justice Weygandt had with the petitioner and which correspondence has been made a part of the complaint (Pl.

Ex. 2, 22a-34a). The effect of this application for revision (Pl. Ex. 2, 19a-34a) was to reinstate the affidavit of prejudice and nullify the resignation, and after the petitioner did this all proceedings in Painesville were terminated as far as the judiciary of the State of Ohio was concerned. To put it mildly, the case was going to be resolved other than in Painesville, and that is exactly where the respondent Ohio Supreme Court and the respondent Justice Weygandt enter the picture, because it was after the September 18, 1954 formalization of petitioner's objections that the Ohio Supreme Court (of which Justice Weygandt is a member) on October 20, 1954 allowed the motion to certify in the cause. The allowance of the motion to certify is to be considered in view of the allegations against respondent Judge Pollock and against respondent Justice Weygandt, allegations incidentally which neither Judge Pollock nor Justice Weygandt have dared to deny either in the State proceedings or in the District Court, if for no other reason because they can't deny their own signatures, and it is their own signatures which have condemned them.

In respect to respondent Judge Pollock, the complaint states that he was at all times a biased and prejudiced Judge, that the November 14, 1953 decision rendered by him in the discovery proceedings was an erroneous decision, that it was known by him to be erroneous, that nevertheless he knowingly and deliberately in his official capacity made the decision, that the overwhelming weight of the evidence and particularly of the documentary bank evidence in the discovery proceedings was such that the jurisdiction decision rendered by him on November 14, 1953 was made to avoid rendering a decision in favor of this petitioner and the estate on the merits of said action.

The complaint treats specifically respondent Judge Pollock's handling of the Bill of Exceptions in the cause, his denial of a fiduciary to the estate, his antedating findings of fact, his filing of the August 3, 1954 journal entry of resignation in violation of petitioner's rights, all of which were designed to deprive this petitioner of his property without due process and equal protection of the law as guaranteed to petitioner by the Fourteenth Amendment, and all of which were then charged to evidence a conspiracy in fact and law between respondent Probate Judge, said Eleanore M. Barry and the attorneys for Eleanore M. Barry, said conspiracy having as its purpose a denial of valuable constitutional rights to this petitioner (8a-11a).

As for the Ohio Supreme Court and the Ohio Chief Justice, the fantasy of this entire cause is contained in the decision since rendered and now reported in 163 Ohio St. 124, 126 N. E. 2d 129, decided April 13, 1955, with the instant action having been instituted in the District Court on December 17, 1954, some four months earlier. That the Ohio Supreme Court should even have decided the case pending the ultimate outcome of the federal action is in and of itself a subject for criticism. But that the Ohio Chief Justice should have participated in the decision with a collusion charge resulting from his own signature on the record against him is a matter that this Court now can judge for itself. A court in deciding a case presumably is to be impartial. That the Ohio Supreme Court was not such is apparent from the record in these present proceedings. That the petitioner had been prejudiced in the State Courts by a denial of a fiduciary is hardly a subject of dispute. There was in the State proceedings a 754 page Bill of Exceptions. Why the Ohio Supreme

Court apparently wanted to by-pass that Bill of Exceptions is apparent upon examination of the two frauds in the estate, one in 1930 and one in 1937, both of which were in the Bill of Exceptions and neither of which frauds were presented in the so-called record filed by respondent Barry in the Ohio Supreme Court.

The 1930 fraud in short involved the omission from the probate inventory in the estate of a note owing to the estate. The balance on this note had been paid to the executrices in the estate and this payment in like manner was omitted from the probate accounting filed in the estate (16a, 43a). The executrices in the estate were represented in 1930 by a Painesville attorney, and this same Painesville attorney also represented respondent Barry in her perpetration of the 1937 fraud. In 1937, the first of the two life beneficiaries in the estate had died. In that year there already was a shortage in the accounts of the life beneficiaries (43a, 44a). In that year, because of the shortage, the Probate Court in 1937 could have required at least a bond had the shortage come to light at that time. This is even conceded by the Ohio Supreme Court in 163 Ohio St. at page 139. However, the Probate Court did not do so in 1937 because the respondent Barry in 1937 through the manipulation of a Probate Court accounting filed by her concealed the existence of that shortage in the Patrick Sexton estate, conceded by the Ohio Supreme Court at page 139, *supra*, to be open in the year 1937, and her conduct in this respect made the respondent Barry a trustee in the estate and subject to subsection 4 of Section 10501-53 of the Ohio General Code, recognized by the Ohio Supreme Court at page 136 of its opinion in 163 Ohio St. 124. The proof of the conduct was in the Bill of Exceptions which could have been waived with-

out cost into the Ohio Supreme Court as the record to be considered, this through the mere expedient of a fiduciary appointment denied to the estate by a biased and prejudiced judge who entered into a conspiracy (8a-11a) to protect himself and those attorneys who practice law in Painesville (Pl. Ex. 1, 13a-18a), with a Chief Justice in the case charged by his own signature with collusion (10a-11a), and with a State Supreme Court quite obviously using its office to salvage these two Judges. In this background, the Circuit Court handed down its decision (Appendix B, *infra*, pp. 30-39).

The Circuit Court in deciding the case tacitly recognized the effect of the District Court's opinion. The Circuit Court, however, endeavors to take issue with the District Court on the due process aspect of the case, and at the same time the Circuit Court denies the right to an injunction in any event. In so doing, the Circuit Court holds that a biased and prejudiced Judge has a complete immateriality to a litigant's day in court. The Circuit Court in its decision further disregards the conspiracy aspect of the case, while at the same time in its reference to "usual practice" under Ohio law the Circuit Court actually adjudicates the prejudice in a manner definitely adverse to the respondent Probate Judge. In this case the fact of that prejudice was particularly important to the factual allegations in the complaint which petitioner charged in combination to constitute a conspiracy of which the respondent Probate Judge was a part. Even though in practical effect having adjudicated the bias and prejudice in a manner adverse to said Probate Judge, with the result that the allegations of conspiracy as charged in the complaint become of prime importance, the Circuit Court holds that the fact of conspiracy on the part of a State

Judge has no bearing upon constitutional guarantees. Under these circumstances, the Circuit Court holds in effect that in a civil rights case a federal court can never issue an injunction against the courts of a state regardless of the violation and regardless of the fact that the State through conspiracy in its courts may deprive a litigant of all property and even life itself in a manner adverse to the guarantees of a constitutional government. The Circuit Court endeavors to sustain this result by contending that petitioner filed the suit because he had lost a case in the State Courts, which entirely disregards the fact that petitioner actually was the prevailing party in the State Courts at the time of filing this instant complaint.

REASONS FOR ALLOWING THE WRIT.

Rule 19 of this Court states reasons considered by this Court to be of significance in allowance of a writ of certiorari. The most important reason from this Court's standpoint that the writ should be allowed in the instant cause involves the newness and importance of the questions which are presented herewith and their effect in a civil rights case in the area of state-federal relationships. The most important reason from petitioner's standpoint, and also important from the Court's standpoint, as to why the writ should be allowed stems from the fact that the court below has decided the instant case in a manner obviously contrary to the manner in which this Court and at least two Circuit Courts have decided parallel cases. The combination of these reasons present that kind of case which this Court considers to be peculiarly within its province through allowance of certiorari.

I.

Section 2283 Specifically Permits an Injunction Against the Ohio Courts in This Cause As Being "in Aid of" a District Court's Jurisdiction. This Court Already Has Recognized the Importance of a Proper Interpretation of This Section as Being Cause for Allowance of Certiorari. A Proper Interpretation of This Section as Applied to a Civil Rights Case Is of Special importance in the Area of Federal State Relations. Such Interpretation is a Matter That Should Be Decided by This Court.

In this case the District Court has jurisdiction, in respect to which see Title 28, U. S. C., Section 1343, and 42 U. S. C. 1983-1985. Under such circumstances, the District Court further has power to issue an injunction against the state courts. Such is the clear import of *Amalgamated Clothing Workers of America v. Richman Brothers Co.*, 348 U. S. 511 (1955), decided by this Court after the District Court had rendered its opinion in the instant action. See also *Capital Services, Inc. v. National Labor Relations Board*, 347 U. S. 501 (1954), and as to issuance of injunction after judgment see further *Wells Fargo & Co. v. Taylor*, 254 U. S. 175 (1920), and *Simon v. Southern Railway Co.*, 236 U. S. 115 (1920), both of which cases were recognized as good law even under the former Section 265.

Title 28, Section 2283, provides:

> "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, *or where necessary in aid of its jurisdiction*, or to protect or effectuate its judgments." (Emphasis added.)

In the instant action, the right to an injunction is not jurisdictional. In view of the complaint seeking only an injunction, *American Ins. Co. v. Lester,* 214 F. 2d 578 (C. A. 4, 1954), at page 582 contains the applicable law, as follows:

> "* * * the power of the court to grant injunctive relief in such cases is not forbidden by 28 U. S. C. Section 2283, since the exercise of the injunctive power is not only 'in aid' of the court's jurisdiction but is essential to its effective exercise. * * *"

The holding of the appellate court in the above case was that diversity of citizenship established jurisdiction therein, and that once jurisdiction is established then the District Court has an absolute power in a proper case to enjoin the courts of a State. That is true also of the instant proceedings because the safeguard of the Fourteenth Amendment is particularly within the jurisdiction of the District Courts.

The petitioner sought to enjoin the Ohio Courts from proceeding further in a case then pending in the Ohio Courts on the ground that through conspiracy and interference with appellate processes he had been denied due process of law in the Ohio Courts, with a State Probate Judge as the principal moving party. To lend even more strength to the petitioner's cause, the District Court thereupon decided in effect that on the face of the complaint this petitioner had been denied valuable constitutional rights, this having been done by the District Court through limiting its decision on the motions to dismiss to the injunctive aspect of the case (52a-53a), a limitation incidentally which is recognized by the court below (Appendix B, p. 32). Under such circumstances, the questions presented herein become of fundamental importance, because a decision by this Court will in large measure deter-

mine a litigant's right to enjoin the State Courts where jurisdiction of the District Court, pursuant to the provisions of Title 28, Section 1343, U. S. C. is invoked because of the provisions of the Civil Rights Act, Title 42, Sections 1983-1985, U. S. C. Heretofore, the injunctive remedy was defeated during pendency of suit in the State Court by reason of the provisions of the former Section 265. According to petitioner's contentions, Section 2283 specifically permits an injunction in this cause because the limitations of the former Section 265 no longer have application to the federal courts; such was recognized explicitly by this Court in *Amalgamated Clothing Workers v. Richman Brothers Co.*, 348 U. S. 511 (1955); and although an injunction was not allowed in that case such denial nevertheless established that it was the exact language of the statute which was to control.[4] In this regard, although a decision in this case will have a possible effect upon all due process cases, the petitioner confines his own particular circumstances to the allegations of the complaint herein, so that, for example, the petitioner emphasizes the conspiracy aspect of the case, in respect to which see *Picking v. Pennsylvania Railroad*, 151 F. 2d 240 (C. A. 3, 1945), cert. denied 332 U. S. 776 (1947), and

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[4] Although this Court has said that the language of the statute is to control, the court below takes a different view, as follows:

> "* * * In spite of amendments which broaden the exception in the previous statute forbidding injunctions against state action by a District Court, Section 2283 'expresses on its face the duty of "hands off" by the federal courts in the use of the injunction to stay litigation in a state court.' * * *." (Appendix B, *infra*, pp. 30-39, at p. 33.)

This language by the court below in reality establishes the validity of petitioner's contentions. The language of the statute grants a right to this petitioner. To defeat this right, the court below adopts a so-called policy even though Congress has chosen to specify.

also the interference with petitioner's appellate rights in the State Courts, in respect to which see *Chessman v. Teets*, 350 U. S. 3 (1955). That there was such interference is inherent not only to the very specific language of the complaint, but also, in view of this Court's denial of certiorari in the principal case, *Sexton v. Barry*, 350 U. S. 838, Case No. 228, October Term, 1955, cert. denied October 11, 1955, such interference is also implicit in the arguments made by respondent Barry in the principal case against grant of certiorari, which arguments in effect consolidate petitioner's present case of action herein.

II.

The Resignation of Respondent Judge Pollock Is No Longer Merely an Allegation of the Complaint. The Fact of the Resignation is Conceded by Brief. On the Basis of That Concession, which the Court Below Notes in its Opinion, the Court Below Now in Effect Has Adjudicated in Fact Respondent Judge Pollock's Bias and Prejudice. It Was This and Other Factors the District Court Recognized by Limiting Its Decision. Under Such Circumstances This Petitioner Did Not Have Due Process of Law in the State Courts. In View of the Lower Court's Effort to Say That This Petitioner Did Have Due Process of Law Makes the Case of Particular Importance Before This Court and Presents Additional Reason For Allowance of Certiorari.

The establishment of the aforementioned principles of law in regard to injunctive relief as respects this petitioner presents now several corollary principles of law which the court below has decided in a manner contrary to those principles which this Court in the past has established in such careful fashion. In this respect, a liti-

gant just does not have due process of law in the State Courts when a State Judge is biased and prejudiced. The petitioner would assume that this was to be accepted without argument, but that was before the court below rendered its decision. Considering that the complaint here charged bias and prejudice, which the court below recognizes, that alone established on the face of the complaint that there had been a denial of due process. This bias and prejudice is further coupled with a conspiracy, in respect to which see *Picking v. Pennsylvania Railroad*, 151 F. 2d 240 (C. A. 3, 1945), cert. denied 332 U. S. 776 (1947). It is also coupled with a deliberate interference with the appellate processes, in respect to which see *Chessman v. Teets*, 350 U. S. 3 (1955), and these in combination or singly in the present case are grounds for District Court jurisdiction, in accordance with the holdings of the Third Circuit and of this Court. The court below misconceived in several particulars the thrust of petitioner's argument. In so doing, the court below has entered into its opinion a contradiction that now fortifies the petitioner's entire contention.[5] That contradiction has to do with the lower court's reference to "usual practice" under Ohio law (Appendix B, *infra*, p. 31) and requires clear insight as to what is actually "usual practice" under Ohio law.

Under Ohio law, it is **not** the usual practice for a Judge to resign when an affidavit of prejudice is filed against him. See, for example, in this respect the respondent Judge Pollock's July 26, 1954 letter in the appendix record, Pl. Ex. "2," p. 22a, setting forth Judge Pollock's understanding that he had a right to a hearing which nevertheless he preferred to avoid. The Judge's right to

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[5] In fact, even in its citation of authority, as close analysis will show, the court below in many regards actually strengthens the petitioner's cause in this Court.

a hearing in Ohio is most recently reiterated in *State ex rel. Pratt v. Weygandt, Chief Justice,* 164 Ohio St. 463, 132 N. E. 2d 191 (1956), and as a matter of common knowledge and practice a Judge in Ohio just doesn't resign unless it becomes unavoidable. This is unlike the federal practice and the practice in other jurisdictions, where the affidavit works an automatic disqualification, with the result that a Judge in Ohio is accorded quite apparently the option to resign if in fact he is prejudiced, and such is the only interpretation that can be accorded to the decision below in the instant cause. Under such circumstances, the lower court's holding that this petitioner had due process of law in the State Courts is in direct violation of every principle of law laid down by this Court, for example, in *In Re Murchison,* 349 U. S. 133 (1955), and this alone is reason for grant of certiorari. The bias and prejudice of the respondent Judge Pollock had become so apparent in this case that, in the District Court, respondent Barry's counsel even had to concede prejudice to be the ground of resignation.[6] That alone would be enough in the average case even in view of a motion to dismiss. But now the court below makes an entry equivalent to that same fact right in its opinion, and these circumstances now establish the exact violence that has been done to due process in the Ohio Courts.

The record in this case now shows in reality an adjudication of prejudice in respect to the Probate Judge originally responsible for these proceedings. That same adjudication incidentally contains also dicta to the effect that there was error in the failure of that same Probate

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[6] See pp. 9-12, *supra*, as respects this resignation. Also see 48 *C. J. S.* p. 1079, Judges, Sec. 93 as regards the duty of a Judge not to resign unless he is in fact prejudiced.

Judge to appoint a trustee, and that apparently is based upon an interpretation of the "custodian" feature of the State Supreme Court decision, because in the probate law a "custodian" is a trustee, and this doesn't even take into consideration the two alternative grounds in the 754 page Bill of Exceptions. The record in this case further shows that the Ohio Supreme Court was under suit at the time it decided the case, and the record also shows that its Chief Justice was charged by his own signature with collusion in his defense of said Probate Judge. To say under these circumstances that petitioner had due process of law in the State Courts is to stretch the imagination to the breaking point. These circumstances are such that this Court still has before it the record in the State proceedings and now also has that in the federal proceedings, and in this respect see *Raymond G. Cahill v. The New York, New Haven and Hartford Railroad Company*, No. 436, Oct. Term, 1955, decided May 14, 1956 as to the recall point in the case. In this regard, it is to be noted that the two Judge respondents appeared in the District Court only. They did not enter appearances in the Circuit Court, so that they were merely endeavoring in the District Court to avoid the effect of an injunction, apparently with the purpose in mind of setting up 163 Ohio St. 124 as their defense in this case, with Justice Weygandt sitting in on 163 Ohio St. 124 to see that the defense would be there, even though this Court in *In Re Murchison*, 349 U. S. 133 at page 136 states that no man can ever be a judge in his own case. This also will become even more apparent, *infra*, pp. 24-26, when it is considered that the court below accorded weight to 163 Ohio St. 124 on the rule of recognizing decisions of the state courts.

III.

The Ohio Supreme Court as a Defendant Herein was Served with Process. While this Litigation is Pending, the Principle of Porter v. Lee, 328 U. S. 246, at Page 251, Makes 163 Ohio St. 124 at Best a Most Questionable Decision, Especially in View of This Court's Decision in In Re Murchison, 349 U. S. 133, and the Lower Court's Decision in This Respect Now Raises in the Area of Federal and State Relationships Questions of Law That Should be Decided by This Court.

Additional reason for certiorari is presented by the decision of the court below in its recognition of the Ohio Supreme Court's decision in *Sexton v. Barry*, 163 Ohio St. 124, 126 N. E. 2d 129. The court below is in clear conflict with the decision of this Court in *Porter v. Lee*, 328 U. S. 246 (1946). In *Porter v. Lee*, at page 251, this Court said:

> "It has long been established that where a defendant with notice in an injunction proceeding completes the acts sought to be enjoined the court may by mandatory injunction restore the status quo. *Texas & New Orleans R. Co. v. Northside Belt R. Co.*, 276 U. S. 475, 479."

To the same effect, see also *Ramsburg v. American Investment Company of Illinois*, 231 F. 2d 333 at page 336 (C. A. 7, 1956).

The Ohio Supreme Court in the instant cause was served with process. The complaint further shows that through the denial of a fiduciary to the estate the bias and prejudice and conspiracy on the part of the respondent Judge Pollock had denied substantial rights to petitioner in the proceedings then pending in the Ohio Supreme Court. That substantial rights were denied therein is also

inherent from respondent Barry's very arguments to this Court in that case, No. 228, October Term, 1955. Under such circumstances the accord given to the Ohio Supreme Court's decision disregards the principles of *Porter v. Lee, supra.* The court below endeavored to justify this result on the authority of *Erie Railroad v. Tompkins,* 304 U. S. 64 (1938), and the interpretation of this Court's decision in that case presents the next reason for grant of certiorari.

IV.

A Judgment Obtained by Fraud Is Specifically Subject to Collateral Attack in Equity Because in a Court of Equity There is No Judgment Which the Court Will Recognize. In Its Recognition of 163 Ohio St. 124, the Court Below is in Conflict Both With the Second Circuit and With Prior Decisions of This Court, and This Presents Additional Reason For Grant of Certiorari.

Even if it were to be assumed that *Porter v. Lee,* 328 U. S. 246, were to have no bearing in this cause, which petitioner cannot believe, the court below further has disregarded the decisions of this Court in *Simon v. Southern Railroad,* 236 U. S. 115 (1920), and *Wells Fargo & Co. v. Taylor,* 254 U. S. 175 (1920), and in so doing the court below now is in conflict with the Second Circuit in *Hadden v. Rumsey Products,* 196 F. 2d 92, 96, (C. A. 2, 1952) the rationale of these cases being that a judgment obtained by fraud is never binding on any Court in an equity action because in equity there is no judgment, and because there is no judgment a collateral attack, so-called, is permitted; and in such instances *Erie Railroad v. Tompkins,* 304 U. S. 64, has no application whatsoever under the doctrine of *Simon v. Southern Railroad, supra,* and *Wells Fargo & Co.*

v. Taylor, supra. In short the court below is in conflict with those very cases which permit a collateral attack on the ground of fraud. Although the court below has endeavored to dismiss lightly the fraud aspect of this case on a pleading technicality, it is to be noted that it does so only as to one of several allegations of fraud. Even as to the particular allegation which the court below attacks, its interpretation at best would only necessitate commencement of the suit all over again merely to amend the complaint. The petitioner's position was and is that the fraud as to the filing of the journal entry of August 3, 1954 is sufficiently and adequately stated in terms of present intent and also in terms of an overt act in furtherance of the conspiracy. In this regard, the court below is in conflict further with *Picking v. Pennsylvania Railroad,* 151 F. 2d 240, (C. A. 3, 1945), cert. denied, 332 U. S. 776, with the Third Circuit at page 244 citing the rule of law to be that it is inexpedient to decide grave constitutional questions upon a demurrer, or equivalent motion, if there is a reasonable likelihood that the production of evidence will make the answers to the questions clearer. In any event, the court below does not question the adequacy of the other allegations of fraud, because clearly these are stated in terms of present intent, and this certainly does demand the production of evidence.

CONCLUSION.

For the foregoing reasons, the petitioner respectfully submits that this petition for certiorari should be allowed.

Respectfully submitted,

JAMES F. SEXTON,

Attorney for Petitioner.

APPENDIX A.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

U. S. CONSTITUTION, ARTICLE XIV, AMENDMENTS, SECTION 1.

> "Section 1. * * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

TITLE 28, SECTION 1343, U. S. C. CIVIL RIGHTS.

> The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
>
> (1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, or by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;
>
> (2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur or power to prevent;
>
> (3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States.

TITLE 28, SECTION 2283, U. S. C. STAY OF STATE COURT PROCEEDINGS.

> A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

TITLE 42, SECTION 1983, U. S. C. CIVIL ACTION FOR DEPRIVATION OF RIGHTS.

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

TITLE 42, SECTION 1984, U. S. C. SAME; REVIEW OF PROCEEDINGS.

> All cases arising under the provisions of this act in the courts of the United States shall be reviewable by the Supreme Court of the United States, without regard to the sum in controversy, under the same provisions and regulations as are provided by law for the review of other causes in said court.

(Note: The following Section 1985 provides for damages. Although not specifically applicable here in view of the injunctive nature of the case, several of its provisions are pertinent for comparison purposes.)

TITLE 42. SECTION 1985, U. S. C. CONSPIRACY TO INTERFERE WITH CIVIL RIGHTS—PREVENTING OFFICER FROM DOING HIS DUTY.

(2) * * * if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, * * *

(3) If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the law, or of equal privileges and immunities under the laws; * * * in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

APPENDIX B.

Opinion of the Court of Appeals for the Sixth Circuit.

(Decided April 18, 1956.)

Before SIMONS, Chief Judge, ALLEN *and* MILLER, Circuit Judges.

ALLEN, Circuit Judge. The District Court dismissed appellant's complaint, which alleged a violation of his constitutional rights by the Judge of the Probate Court of Lake County, Ohio, and by other defendants. This appeal was then instituted.

The case arises out of the following facts, which are undisputed.

In August, 1953, appellant, claiming to be a legatee of the estate of Patrick Sexton, deceased, filed in the Probate Court of Lake County, Ohio, a petition praying for discovery of assets of the estate, which appellant alleged had been wrongfully appropriated by appellee Eleanore M. Barry. The will was probated November 5, 1928, and the final account was approved in 1930. The Probate Court after an extended hearing determined that, after the administration of the estate of Patrick Sexton had been completed, the residue, in accordance with the will, was distributed to two life tenants and that such property then ceased to be the property of the estate. The court therefore dismissed the action for want of jurisdiction. The judgment was reversed by the Court of Appeals for the Seventh District of Ohio and appellant thereupon made application to the Probate Court for appointment of a trustee and also for appointment of an administrator de bonis non. The Probate Court dismissed the application for appointment of trustee and continued the application for appointment of administrator. Appellee Barry meanwhile filed in the Supreme Court of Ohio a motion to

certify the record, which was granted. That court unanimously held that the Probate Court had no jurisdiction in the proceedings and reversed the judgment of the Court of Appeals, *Sexton v. Barry*, 163 O. S. 124. Appellant then filed in the Supreme Court of the United States a petition for certiorari to review the judgment of the Supreme Court of Ohio, which was denied October 11, 1955.

Prior to the decision of the Supreme Court of Ohio reversing the judgment of the Ohio Court of Appeals, appellant filed an affidavit of prejudice against the Judge of the Probate Court. In accordance with the usual practice the Chief Justice of the Supreme Court of Ohio suggested that the Judge of the Probate Court voluntarily retire from the case, which was done. Appellant objected to a statement made by the Probate Judge in the entry with reference to his withdrawal from the case and insisted that the Chief Justice of the Supreme Court of Ohio ask for a revision of the journal entry in the Probate Court. The Chief Justice declined to take this action on the ground that this matter was not within his jurisdiction. Later the Chief Justice appointed a disinterested judge from another Ohio county to hear the Probate Court proceedings, but this matter was held in abeyance while the case was pending in the Supreme Court of Ohio on motion to certify the record. Appellant filed the present complaint, December 17, 1954, joining with appellee Barry, whom he charged with fraudulent misappropriation, the Chief Justice of the Supreme Court of Ohio, the Supreme Court of Ohio, the Probate Court of Lake County, Ohio, and the Judge of the Probate Court of Lake County, Ohio, all of whom he alleged had deprived appellant of his constitutional rights. After the dismissal of this action by the United States District Court the Supreme Court of Ohio issued its decision reversing the judgment of the Ohio

Court of Appeals. Appellant's action in the District Court sought a preliminary and final injunction restraining the Supreme Court of Ohio from conducting any further the proceedings now pending before it. It also sought a mandatory injunction requiring the Probate Court to revise its journal entry with reference to withdrawal from the case, an order directing the Chief Justice of the State of Ohio to assign an impartial judge to the Probate Court of Lake County to hear and determine the proceedings, an order directing appellee Barry to deliver certain assets of the estate into the custody of the Probate Court, and an order directing the Supreme Court of Ohio and the Probate Court to report to the United States District Court as to the disposition of all proceedings with reference to the estate and the trust and with reference to the compliance with the mandates of the District Court. The District Court dismissed the complaint upon the ground that, under *Amalgamated Clothing Workers of America v. Richman Bros. Co.*, 211 Fed. (2d) 449 (C. A. 6), affirmed by the Supreme Court of the United States in 348 U. S. 511, a federal judge should keep "hands off" in the use of the injunction to stay litigation in a state court.

The judgment of the District Court must be affirmed. Appellant's principal argument is addressed to the fact that the District Court committed reversible error because the Supreme Court of the United States in *Capital Service, Inc. v. National Labor Relations Board*, 347 U. S. 501, held that a District Court may issue an injunction against a state court during the pendency of proceedings in the state court. This was a labor relations case which involved conflict between the National Labor Relations Board and the state court. The petitioner had sought relief from picketing in a labor controversy in a state court, where it secured an injunction, and a few days later it filed a charge

of unfair labor practice with the National Labor Relations Board, which in turn, under Section 10 (1) of the National Labor Relations Act, sought an injunction from the District Court staying the state court proceedings. The Supreme Court of the United States held that the jurisdiction of the National Labor Relations Board was exclusive, that it arose under a statute regulating commerce and fell within one of the express exceptions of 28 U. S. C., Section 2283, and that the injunction issued by the federal court was valid and proper. The scope of the holding was limited by the subsequent decision of the Supreme Court in *Amalgamated Clothing Workers of America v. Richman Bros. Co.*, *supra*, which held that, in absence of an application to the National Labor Relations Board in an action where an injunction was sought in a state court against picketing, the federal court had no jurisdiction to enjoin the state court action. Both cases involved the National Labor Relations Act and controlling questions were raised which do not exist here. However, the principle stated by this court in 211 Fed. (2d) 499 still applies. The general rule that under Section 2283 a federal court is without power to compel relitigation of cases already adjudicated in state courts is still in force. In spite of amendments which broaden the exception in the previous statute forbidding injunctions against state action by a District Court, Section 2283 "expresses on its face the duty of 'hands off' by the federal courts in the use of the injunction to stay litigation in a state court." Cf. *Toucey v. New York Life Insurance Company*, 314 U. S. 118.

Appellant's factual contention is that the Probate Judge was disqualified because of bias and prejudice, that he was guilty of a "fraud in law," that this fraud is admitted for the purpose of deciding the motion to dismiss and that the Chief Justice of the Supreme Court by filing

a motion to dismiss admits that he acted in collusion with the Probate Court to deprive appellant of his constitutional rights. While in deciding a motion to dismiss the complaint the court assumes the existence of facts well pleaded, Cf. *Chessman v. Teets*, 350 U. S. 3, mere conclusions of the pleader are not accepted as true. 27 C. J. S. 248; *Scott v. Empire Land Co.*, 5 Fed. (2d) 873, affirmed 24 Fed. (2d) 417 (C. A. 5). Here there are no facts pleaded which even tend to show fraud of the Probate Judge, or collusion of the Chief Justice of the Supreme Court of Ohio. The allegations of fraud are mere conclusions. Typical is appellant's averment in the complaint that the journal entry of August 3, 1954, which the Probate Judge filed in withdrawing from the case, amounts to "fraud in law." Appellant's legal contentions arise out of his real grievance, which is that he lost his case. He claims that he was denied due process and equal protection of the laws. Section 2283 upon which he relies reads as follows:

> "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

Appellant's application for injunction plainly does not fall within the first exception of Section 2283, for it is not expressly authorized by Act of Congress. Also the injunction is not necessary to protect any judgment of the District Court. The only judgment issued by the District Court is the judgment of dismissal of appellant's action. However, appellant contends that injunction should be issued in order to aid the District Court's jurisdiction. This ignores what the Supreme Court has called "the closely circumscribed jurisdiction given to the District

Court." *Amalgamated Clothing Workers v. Richman Bros. Co., supra.* No express nor implied jurisdiction is given to the District Court to issue an injunction in an ordinary probate proceeding which is being fully tried in the state courts. To find that such jurisdiction exists in the District Court is "to generalize where Congress has chosen to specify." *Amalgamated Clothing Workers v. Richman Bros. Co., supra.* The District Court, as explained below, does not have jurisdiction to relitigate a case tried in the state courts, and hence an injunction will not aid its jurisdiction. *Amalgamated Clothing Workers v. Richman Bros., supra,* 519. Individual cases relied on by appellant have no bearing here. In *American Insurance Co. v. Lester,* 214 Fed. (2d) 578 (C. A. 4), the federal court had independent, exclusive jurisdiction under the Federal Declaratory Judgment Act. The case of *Chessman v. Teets, supra,* involves a conviction and sentence of death for first degree murder and an application, not for injunction staying the normal process of the courts, but for habeas corpus.

As to all of the questions presented, appellant had full hearing in three state courts. The Supreme Court of Ohio, in a unanimous opinion binding here (*Erie Railroad Company v. Tompkins,* 304 U. S. 64), upheld the Probate Court's conclusion that it had no jurisdiction because under the will a lawful distribution of the personal property had been made to the life tenants and such assets had ceased to be property of the estate.

The fact that appellant lost his case does not constitute denial of due process nor of equal protection of the laws. Law, in its regular course of administration through courts of justice, is due process, and, when secured by the law of the state, the constitutional requisite is satisfied. Due process is so secured by laws operating on all alike, and not subjecting the individual to the arbitrary exercise

of the powers of government unrestrained by the established principles of private right and distributive justice. *Caldwell v. Texas,* 137 U. S. 692; *Duncan v. Missouri,* 152 U. S. 377. Due process is "a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial." *Dartmouth College v. Woodward,* 4 Wheaton 518. The mere fact that a person is unsuccessful in a court in a matter involving life, liberty, or property does not show that there has been a violation of the due process of law guaranty. 12 Amer. Jur. 273 (§ 577); *Goltra v. Weeks,* 271 U. S. 536. The doctrine of due process does not confer the right to litigate the same question twice. *Baldwin v. Iowa State Traveling Men's Ass'n.,* 283 U. S. 522, 524. The equal protection of law implies that all litigants similarly situated may appeal to courts for both relief and defense under like conditions, with like protection, and without discrimination. *Old Colony R. Company v. Assessors of Boston,* 309 Mass. 439. Appellant had due process and the equal protection of the laws.

As to appellant's allegations of bias and prejudice, it is the general rule that a judgment may not be attacked collaterally on the ground of judicial disqualification. *Cunningham v. Mitchell,* 21 Fed. (2d) 881 (C. A. 9), certiorari denied 276 U. S. 614. The judicial act of a disqualified judge is only voidable and not void, and hence the disqualification does not affect the judge's jurisdiction. 48 C. J. S. 1109 (Judges, Section 97); 30 Am. Jur. 802 (Judges, Section 97); The Restatement of the Law of Judgments, Section 124; *Crescent City Live Stock Co. v. Butchers' Union Slaughter-House Company,* 120 U. S. 141. In that case the Supreme Court of the United States held that a plaintiff who claimed that fraud existed in the procurement of a judgment in the state court of

Louisiana could not attack the judgment collaterally in the federal District Court. The Supreme Court declared that the records of the proceedings of a judicial tribunal import verity; "its judgments cannot be impugned except by direct process from superior authority." In *Owens v. Dancy*, 36 Fed. (2d) 882 (C. A. 10), certiorari denied 281 U. S. 746, a petitioner in a habeas corpus proceeding alleged bias and personal prejudice on the part of the judge. The Circuit Court of Appeals ruled that the question of disqualification of a judge because of personal interest or bias could not be raised by collateral attack, but was reviewable only on error of appeal. To the same effect in *Willis v. Scott*, 40 Fed. (2d) 330 (C. A. 10), certiorari denied 282 U. S. 877. It was there asserted that the Chief Justice of the Supreme Court of Oklahoma was biased and prejudiced against appellant and that the judgment against appellant should therefore be set aside. The Court of Appeals assumed that the bias existed but refused to permit a collateral attack upon the judgment. It said:

> "The extreme prejudice of Justice Branson may be assumed; yet it does not render the decision void. The subject was fully and carefully considered by this Court in Owens v. Dancy, 36 F. (2d) 882, and it was there ruled that the act of a disqualified judge is not void, but voidable only, and, while it is reviewable on error or appeal, it is not subject to collateral attack."

Moreover, it is the settled law that the District Court in the exercise of its equity powers will not review in an independent action orders entered by a state court. Appellant contends that he applied for the appointment of a trustee and the appointment of an administrator de bonis non after the reversal of the judgment of the Probate Court of Lake County by the Court of Appeals

of the Seventh Judicial District of Ohio and before the reversal of that judgment by the Supreme Court of Ohio, and that the Probate Court was compelled to grant his application. Certainly it was not error for the Probate Court not to act upon appellant's application for an administrator de bonis non while the case was pending in the Supreme Court of Ohio on motion to certify the record.

What appellant asks is that this court order the District Court to relitigate the same issues which have now been finally disposed of by the Supreme Court of Ohio in a judgment binding on this Court. As held by this Court in *General Exporting Co. v. Star Transfer Line,* 136 Fed. (2d) 329, a federal District Court will not function as a court of review for the state court. The District Court there dismissed an action praying that proceedings in the state court be declared null, void, and of no effect and this Court affirmed the decision of the District Court, stating:

> "The attempt to relitigate in federal courts issues already determined in state court proceedings has been disapproved in numerous opinions of United States Courts below the grade of the Supreme Court. Ritholz v. North Carolina State Board of Examiners in Optometry, D. C. N. C., 18 F. Supp. 409, 413 (three-judge court); Davega-City Radio v. Boland, D. C. N. Y., 23 F. Supp. 969, 970 (three-judge court); Hall v. Ames, 1 Cir., 190 F. 138, 140, 141; Furnald v. Glenn, 2 Cir., 64 F. 49, 54."

Cf. *Davega-City Radio, Inc. v. Boland,* 23 Fed. Supp. 969 (S. D. N. Y.), in which the court declared:

> "There is also a further reason why the suit must be dismissed, namely, the principle that a decision of a state court may not be reviewed by bill in equity in a federal court. American Surety Co. v. Baldwin, 287 U. S. 156, 164, 53 S. Ct. 98, 100, 77 L. Ed. 231, 86

A. L. R. 298; Lynch v. International Banking Corp., 9 Cir., 31 F. 2d. 942, certiorari denied, 280 U. S. 571, 50 S. Ct. 28, 74 L. Ed. 6624; Furnald v. Glenn, 2 Cir., 64 F. 49, 54; Ritholz v. North Carolina State Board, D. C. M. D. N. C., 18 F. Supp. 409, 413. Here the plaintiff has presented to the state court the same questions as to the jurisdiction of the state Board that it wishes this Court to decide. The issue having been decided adversely to it, its remedy is appeal through the appropriate state courts and, if necessary, review by the Supreme Court of the United States. It cannot obtain a review by this independent suit in the federal court."

See also *H. J. Heinz Co. v. Owens*, 189 Fed. (2d) 505, 509 (C. A. 9).

It is shown upon the face of this complaint that appellant regularly invoked the jurisdiction of the state court, the case was tried, judgment was rendered and eventually affirmed by the Supreme Court of Ohio. It is clear that appellant was not denied due process of law or the equal protection of the law under the Civil Rights Act. This Act does not give rise to an exception to the general principle that a decision of the state court may not be reviewed by bill in equity in a federal court. *Davega-City Radio, Inc. v. Boland, supra; Bottone v. Lindsley*, 170 Fed. (2d) 705 (C. A. 10).

As suggested by the Supreme Court of Ohio, *Sexton v. Barry, supra*, 137, 138, appellant's remedy is in the state Court of Common Pleas. *Johnson v. Johnson*, 51 O. S. 446. He has not availed himself of this remedy.

The judgment of the District Court is affirmed.

APPENDIX C.

Judgment.

(Filed April 18, 1956.)

Appeal from the District Court of the United States for the Northern District of Ohio.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Ohio, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

FILED
AUG 24 1956
JOHN T. FEY, Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1956.

No. 212.

JAMES F. SEXTON,

Petitioner,

vs.

ELEANORE M. BARRY,
J. FRANK POLLOCK,
Judge, Probate Court of Lake County,
THE STATE OF OHIO,
THE COURT OF PROBATE, LAKE COUNTY,
CARL V. WEYGANDT,
Chief Justice, Supreme Court of Ohio,
THE STATE OF OHIO,
THE SUPREME COURT OF THE STATE OF OHIO,

Respondents.

BRIEF OF RESPONDENT ELEANORE M. BARRY,
In Opposition to Petition for a Writ of Certiorari.

THOMAS O. NEVISON,
1759 Union Commerce Bldg.,
Cleveland 14, Ohio,
Attorney for Respondent,
Eleanore M. Barry.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—MAIN 1-8647

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In the Supreme Court of the United States

OCTOBER TERM, 1956.

No. _____.

JAMES F. SEXTON,

Petitioner,

vs.

ELEANORE M. BARRY,
J. FRANK POLLOCK,
Judge, Probate Court of Lake County,
THE STATE OF OHIO,
THE COURT OF PROBATE, LAKE COUNTY,
CARL V. WEYGANDT,
Chief Justice, Supreme Court of Ohio,
THE STATE OF OHIO,
THE SUPREME COURT OF THE STATE OF OHIO,

Respondents.

BRIEF OF RESPONDENT ELEANORE M. BARRY, In Opposition to Petition for a Writ of Certiorari.

QUESTIONS PRESENTED.

I.

Whether petitioner has complied with Rule 23 of this Court.

II.

Whether the present action is moot.

III.

Whether the Court below has rendered a decision in conflict with the decision of another Court of Appeals

on the same matter or has decided a federal question in a way in conflict with applicable decisions of this Court.

IV.

Whether petitioner has made the showing of special and important reasons for the granting of a writ of certiorari required by Rule 19 of the Rules of this Court where petitioner has failed to invoke the proper and established remedy available under state law and there has been no adjudication on the merits of his claim.

STATEMENT.

In 1953 petitioner filed in the Probate Court of Lake County, Ohio, a complaint seeking to initiate discovery proceedings concerning certain alleged assets of the estate of one Patrick Sexton who died testate in 1928 (Petitioner's Appendix to Brief in the United States Court of Appeals for the Sixth Circuit, hereinafter cited "App.", 4a), the residue of which estate had been distributed to certain life tenants in 1930 (App. 46a, 47a). Petitioner sought to compel respondent Eleanore M. Barry, to appear before the Probate Court and be examined with respect to this matter (App. 4a).

The Probate Court determined that it had no jurisdiction of the subject matter since the estate of the decedent Patrick Sexton had ceased to exist upon the distribution of the residue thereof to the life tenants in 1930, at which time title to the property so distributed vested in the remaindermen, subject to the life tenancies (App. 4a, 5a, 35a, 36a).

Upon appeal to the Court of Appeals of the Seventh Judicial District of Ohio the judgment of the Probate Court was reversed (App. 5a, 6a, 36a). Respondent moved to certify the record to the Supreme Court of Ohio. The motion was granted.

Thereafter, in April, 1955, the Supreme Court of Ohio, by unanimous vote of the Court, reversed the Court of Appeals, affirmed the action of the Probate Court, and directed the dismissal of the proceedings on the ground that under the laws of Ohio the Probate Court had no jurisdiction of the subject matter (163 Ohio St. 124, 126 N. E. 2d 129; Brief of Appellant, Court of Appeals for the Sixth Circuit, pp. 8 and 9) and that the obligations of a life tenant, or of one to whom he wrongfully transfers personal property, to remaindermen in that property, are enforceable in Ohio by proceedings instituted in the Common Pleas Court, not in the Probate Court, citing *Johnson v. Johnson*, 51 Ohio St. 446, 38 N. E. 61 (1894).

Petitioner has never sought to invoke the jurisdiction of a proper forum; he has not brought any action against respondent Barry in a Common Pleas Court. His claim has therefore never been adjudicated on the merits.

Prior to the decision of the Supreme Court of Ohio reversing the judgment of the Ohio Court of Appeals, petitioner filed an affidavit of prejudice against the Judge of the Probate Court (App. 20a, 21a). In accordance with the usual practice, the Chief Justice of the Supreme Court of Ohio suggested that the Judge of the Probate Court voluntarily retire from the case (App. 27a, 28a) which was done (App. 22a). Petitioner objected to a statement made by the Probate Judge in the entry of withdrawal from the case and insisted that the Chief Justice of the Supreme Court of Ohio ask for a revision of the journal entry in the Probate Court (App. 23a-27a). The Chief Justice declined to take this action on the ground that it was not within his jurisdiction (App. 31a).

Later the Chief Justice appointed a disinterested Judge from another Ohio county to hear the Probate Court proceedings (App. 31a). However, this matter was

held in abeyance while the case was pending in the Supreme Court of Ohio on motion to certify the record (App. 7a).

Petitioner filed the complaint in this present action December 17, 1954 (App. 1a) joining with respondent Barry the Chief Justice of the Supreme Court of Ohio, the Supreme Court of Ohio, the Probate Court of Lake County, Ohio, and the Judge of the Probate Court of Lake County, Ohio, all of whom he alleged had deprived him of his constitutional rights (App. 3a, 4a).

After the dismissal of this action in the United States District Court, the Supreme Court of Ohio issued its decision reversing the judgment of the Ohio Court of Appeals. Certiorari was denied, 350 U. S. 838, No. 228, October term, 1955.

The sole relief sought by the complaint of the petitioner in the present action was injunctive—a preliminary and final injunction restraining the Supreme Court of Ohio from conducting any further proceedings in the matter then pending before it; a mandatory injunction requiring the Probate Court to revise its journal with reference to withdrawal of the Judge from the case; an order directing the Chief Justice of the State of Ohio "to assign an impartial judge to the Probate Court of Lake County" to hear and determine further proceedings in the matter; an order directing respondent Barry to deliver certain assets of the purported estate of Sexton to the Probate Court; and, finally, an order directing the Supreme Court of Ohio and the Probate Court to report to the United States District Court as to the disposition of all proceedings with reference to the alleged estate and trust, and with reference to the compliance of the mandates of the District Court (App. 11a, 12a). No claim for damages was asserted.

The District Court dismissed the action February 21, 1955 (App. 2a) prior to the aforedescribed decision of the Supreme Court of Ohio. The Court of Appeals for the Sixth Circuit affirmed the judgment of the District Court, 233 F. 2d 220 (1956), again noting that "appellant's remedy is in the State Court of Common Pleas. *Johnson v. Johnson*, 51 Ohio St. 446. He has not availed himself of this remedy." 233 F. 2d at 226.

ARGUMENT AGAINST GRANTING THE WRIT.

I.

The petition does not comply with Rule 23 and should therefore be denied.

The petition for writ of certiorari does not contain a concise statement of the case, nor does it anywhere present "with accuracy, brevity, and clearness" the matters essential to an understanding of the points requiring consideration (Rule 23 (4)). It is replete with references to immaterial events unsubstantiated by the record in this case. In many instances petitioner substitutes his unwarranted conclusions, inferences and deductions for statements of fact.

For example, petitioner says (Petition, p. 11) "* * * attorneys for the respondent Eleanore M. Barry * * * were forced to admit in the District Court that he [the Probate Judge] entered his resignation because in effect he was biased and prejudiced in fact." Nothing could be further from the truth. Counsel for respondent Barry at no time admitted that Judge Pollock entered his resignation because he was in fact biased or prejudiced. The order of the Probate Court whereby Judge Pollock recused himself explains fully the basis for his action. He stated therein:

"Whereas, James F. Sexton as Attorney for himself and other members of his family has on numerous occasions made false and derogatory statements regarding the Probate Judge of Lake County and has exhibited a very hostile and antagonistic attitude toward the Judge of said Court, and

Whereas, said Judge has steadfastly attempted to maintain an unprejudiced attitude toward said counsel but now finds it so difficult to continue to do so that he believes that he should not continue to sit as Judge in the case.

* * *"

Many of the statements made by petitioner with respect to the proceedings brought by him in the courts of Ohio are unsupported by the instant record (and are, in fact, unsupportable), relate to an independent action not presently before the Court and, in any event, are completely irrelevant in view of the denial by this Court of the petition for writ of certiorari to the Supreme Court of Ohio, in which substantially the same arguments now advanced by petitioner were therein set forth.

II.

The present action is moot.

The complaint of the petitioner sought only injunctive relief which has been fully summarized in the Statement herein.

Before the complaint containing this prayer was filed in the District Court, the Court of Appeals for the Seventh Judicial District of Ohio had erroneously held that the estate of Patrick Sexton, deceased, remained in existence and that the Probate Court had jurisdiction to hear and determine matters pertaining to this estate, including the discovery proceedings against respondent Barry. Thus

the premises for the relief sought were (a) that an appeal was pending before the Ohio Supreme Court, and (b) that the Probate Court had jurisdiction to proceed and to award relief to appellant in accordance with the mandates which it might receive from the District Court.

In view of the decision by the Ohio Supreme Court rendered after the dismissal of the complaint by the District Court, the first premise has ceased to exist, and the second has been demonstrated to be erroneous. Under these circumstances this Court should now dismiss this petition on the ground that the action has become moot. *Jones v. Montague*, 194 U. S. 147 (1904); *Selden v. Montague*, 194 U. S. 153 (1904); *Mills v. Green*, 159 U. S. 651 (1895).

III.

The decision of the court below is not in conflict with the decision of another Court of Appeals on the same matter, nor is it in conflict with applicable decisions of this Court.

Petitioner suggests that in some way quite unexplained there is some kind of an inconsistency beween the decision of the Court of Appeals for the Sixth Circuit in the instant case and that of the Third Circuit Court of Appeals in *Picking v. Pennsylvania Railroad Co.*, 151 F. 2d 240 (3rd Cir. 1945), cert. denied 332 U. S. 776 (1947).

In the *Picking* case the plaintiffs sought damages for a conspiracy to deprive them of their liberty. They had been seized by law officers in Pennsylvania acting under color of the state extradition law and thereafter were transported by the Pennsylvania Railroad, an alleged co-conspirator, to New York where they had been charged with a misdemeanor. Plaintiffs had in fact been deprived

of their liberty; here petitioner has not been deprived of either his liberty or his property. The most that he has lost is a right to proceed in a particular forum and under special rules of procedure. So long as adequate notice and fair hearing before final decision are provided, the Fourteenth Amendment in no way undertakes to control the power of a state to determine by what process legal rights may be asserted or legal obligations enforced. *Neblett v. Carpenter*, 305 U. S. 297 (1938); *McDonald v. Oregon R. & N. Co.*, 233 U. S. 665 (1914); *West v. Louisiana*, 194 U. S. 258 (1904); *Iowa Central Railway Co. v. Iowa*, 160 U. S. 389 (1896). See also statement of Justice Holmes denying application for a writ of habeas corpus in the *Sacco* and *Vanzetti* cases, New York Times, August 21, 1927.

Nor is there any conflict between the decision below and that in *Hadden v. Rumsey Products*, 196 F. 2d 92 (2nd Cir. 1952). There the Second Circuit Court of Appeals held (at page 96) that where it was shown that the plaintiff had properly taken a default judgment on a cognovit note in a district court in another circuit against the defendant which, at the time such judgment had been taken, had given notice to the plaintiff that it had defenses to such note, the United States District Court "has jurisdiction to entertain an independent action to relieve a party from a judgment." Petitioner here does not seek to restrain enforcement of any judgment. What he originally sought was to restrain the state courts from deciding the question of jurisdiction. A decision denying that a particular state court has jurisdiction is not a judgment from which relief can be granted. *Neblett v. Carpenter, supra; American Surety Co. v. Baldwin*, 287 U. S. 156 (1932).

The decision of the courts below is in fact wholly consistent with, and based in large part upon, *Amalgamated*

Clothing Workers of America v. Richman Bros. Co., 348 U. S. 511 (1955) and the "hands off" policy of 28 U. S. C. § 2283. The rule of that case, involving labor-management problems which are inherently of federal interest, is a fortiori applicable in the present case which concerns the area of probate jurisdiction, a matter of peculiarly local concern i.e. solely for the state courts. Cf. *Sutton v. English*, 246 U. S. 199 (1918). Petitioner's contention that the injunctive relief sought was necessary in aid of the District Court's jurisdiction is fully answered by the Court of Appeals (233 F. 2nd 220 at 224):

> "* * * No express nor implied jurisdiction is given to the District Court to enjoin court proceedings in an ordinary probate matter which is being tried in the state courts. To find that such jurisdiction exists in the District Court is 'to generalize where Congress has chosen to specify.' Amalgamated Clothing Workers of America v. Richman Bros. Co., supra. The District Court, as explained below, does not have jurisdiction to relitigate a case tried in the state courts, and hence an injunction will not aid its jurisdiction. Amalgamated Clothing Workers of America v. Richman Bros., supra, 348 U. S. 519, 75 S. Ct. 457. * * *"

IV.

There are no special and important reasons for granting certiorari; petitioner has failed to invoke the proper and established remedy available under Ohio law, and there has been no adjudication on the merits of his claim.

The Supreme Court of Ohio, without regard to the merits of petitioner's claim, has applied the established law of Ohio that upon final distribution of a personal estate to life tenants, title vests in the remaindermen, the property is no longer property of an estate, and the Probate Court

has no jurisdiction in an action concerning such property. *Flickinger v. Saum,* 40 Ohio St. 591 (1884); *Ratliff v. Warner,* 32 Ohio St. 334 (1877); *Posegate v. South,* 46 Ohio St. 391, 21 N. E. 641 (1889).

The opinion cited with approval *Johnson v. Johnson,* 51 Ohio St. 446, 38 N. E. 61 (1894), which recognized a remedy by action in the Common Pleas Court by a remainderman against a life tenant or one wrongfully receiving property from a life tenant (163 Ohio St. at 137-138, 126 N. E. 2d at 136-137). Thus the Court clearly pointed out the proper remedy available to petitioner—a remedy which is in no way foreclosed or prejudiced by the judgment which he now asks this Court to review.

No substantial Federal question is presented since petitioner is not without remedy if entitled to redress. He has available to him a forum within which properly to assert any claim he may have. *Copperweld Steel Co. v. Industrial Commission of Ohio,* 324 U. S. 780 (1945); *McCoy v. Shaw,* 277 U. S. 302 (1928); *Woods v. Nierstheimer,* 328 U. S. 211 (1946).

CONCLUSION.

For the foregoing reasons the petition for a writ of certiorari in this case should be denied.

Respectfully submitted,

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28124

SEP 17 1956

JOHN T. FEY, Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1956.

No. 242.

JAMES F. SEXTON,

Petitioner,

vs.

ELEANORE M. BARRY,
J. FRANK POLLOCK,
Judge, Probate Court of Lake County,
THE STATE OF OHIO,
THE COURT OF PROBATE, LAKE COUNTY,
CARL V. WEYGANDT,
Chief Justice, Supreme Court of Ohio,
THE STATE OF OHIO,
THE SUPREME COURT OF THE STATE OF OHIO,

Respondents.

REPLY BRIEF OF PETITIONER.

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THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—MAIN 1-5647

In the Supreme Court of the United States

OCTOBER TERM, 1956.

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JAMES F. SEXTON,

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ELEANORE M. BARRY,

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Judge, Probate Court of Lake County,

THE STATE OF OHIO,

THE COURT OF PROBATE, LAKE COUNTY,

CARL V. WEYGANDT,

Chief Justice, Supreme Court of Ohio,

THE STATE OF OHIO,

THE SUPREME COURT OF THE STATE OF OHIO,

Respondents.

REPLY BRIEF OF PETITIONER.

I.

Respondent Barry charges that counsel for the respondent Barry at no time admitted that respondent Judge Pollock resigned because he was "biased and prejudiced in fact." The truth is that such an admission was made, as will be readily apparent by the quotations which follow.

Respondent Barry in her brief (p. 6, Brief in Opposition) quotes from the respondent Judge Pollock's journal entry of resignation. Her quotation is incomplete. That part which constitutes the omission reads as follows:

> "Now, therefore, on his own motion the Court enters a finding that **he is disqualified** to continue as Judge in the above entitled case and also in a related case entitled In re Estate of Patrick Sexton, Deceased,

> involving all of the same parties and issues growing out of the same estate, and he requests the Chief Justice of the Supreme Court of Ohio to assign another Judge to the case as provided by Section 2101.39 R. C." (Emphasis added.)

This journal entry incidentally is entered in Doc. 7, p. 147, entitled "In re Trusteeship of Patrick Sexton, Deceased."

Respondent Barry in the State and Federal Courts has been represented by a total of five attorneys, two being from Painesville and three from Cleveland, Ohio. Her Painesville attorneys were and are Miss Irene A. Lennon and Mr. William M. Hubbard, and in a brief filed by them in the District Court (in respect to which see p. 36a of the Appendix Record) there appears the following:

> "Plaintiff then filed in the Probate Court an affidavit of prejudice against J. Frank Pollock, Probate Judge. After correspondence (which is attached to the complaint filed herein) with the Chief Justice of the Supreme Court of Ohio, Judge Pollock **disqualified** himself on **the ground of prejudice** * * *" (Emphasis added.)

As one reads the journal entry of respondent Judge Pollock and the above admission, one can come only to the conclusion that the prejudice was conceded in fact by the respondent Barry's counsel. Any statement otherwise is a misrepresentation to this Court.

In connection with the prejudice charge, which has now been adjudicated actually adversely to the respondent Probate Judge, the petitioner emphasizes again that the importance of the prejudice is in laying the foundation for the charge of conspiracy against Judge Pollock and those with whom he combined. In connection therewith, the petitioner likewise again emphasizes the "usual practice" under Ohio law, in respect to which see again *State ex rel. Pratt v. Weygandt, Chief Justice*, 164 Ohio St. 463, 132

N. E. 2d 191 (1956). As pointed out in the petition, a Judge in Ohio doesn't just resign unless of course he is prejudiced. See Cleveland Press, August 4, 1956, in reference to *Miller v. Miller*, Common Pleas Court, Cuyahoga County, Ohio, wherein the Judge contested the prejudice and demanded a hearing. A photostatic copy of the article to which reference is had is attached hereto (p. 9) of this reply brief), and note the seriousness with which Justice Weygandt speaks as to the "unbenching" of a Judge. Then consider the respondent Judge Pollock's entire conduct as outlined in the correspondence in the appendix record, and then consider further the charge of conspiracy, all of which charges are admitted for purposes of a motion to dismiss.

II.

Respondent Barry's argument that the action is moot was advanced to the court below. *Porter v. Lee*, 328 U. S. 246 (1946) presents the rule clearly in a manner contrary to the respondent's contentions, and this is because service of process was had both upon the Ohio Supreme Court and upon Justice Weygandt. Also see *In re Murchison*, 349 U. S. 133, at page 136. The respondent Barry does not answer the violation by the court below of this Court's decision, both as to *Porter v. Lee, supra*, and *In re Murchison, supra*. Furthermore, respondent Barry does not answer as to the charge of conspiracy or the fraud with respect to the short-form record filed by her in view of the denial of a fiduciary to the estate. In this respect, reference again is made to *Simon v. Southern Railway*, 236 U. S. 115 (1915) and *Wells Fargo & Co. v. Taylor*, 254 U. S. 175 (1920) (See Petition for Certiorari, pp. 17 and 25) and in *Chessman v. Teets*, 350 U. S. 3 (1955) (See Petition for Certiorari, pp. 20 and 21).

III.

The complaint in this case charges conspiracy on the part of a State Judge. The acts of prejudice are detailed in the complaint so as to lay the foundation for the overt acts evidencing that conspiracy. In the court below the respondent Barry never even thought to question the adequacy of the complaint in this respect. In fact, petitioner might add, respondent Barry recognized quite clearly the conspiracy aspect of the case.[1] Under such circumstances, the petitioner has been denied his forum, not because of the probate statutes of Ohio, but because the courts of a State were part of a conspiracy to deprive the petitioner of the remedy which those statutes explicitly accord to him, and that is the distinction over those cases which respondent Barry cites in her brief. The court below is clearly and squarely in conflict with *Picking v. Pennsylvania Railroad*, 151 F. 2d 240 (C. A. 3, 1945), cert. denied 332 U. S. 776 (1947), because it is the conspiracy which lays the foundation for District Court jurisdiction in a situation wherein the judgment in the State Courts has become an absolute nullity because of the conspiracy. In this connection, even in her brief, by her reference to the language of Justice Holmes, the respond-

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[1] On page 12 of the brief filed by respondent Barry in the court below, the respondent Barry herself viewed the complaint as presenting the following question:

> "Should the District Court below have assumed jurisdiction in a civil action to control proceedings in an action filed in the Probate Court of Lake County, Ohio and then on appeal in the Supreme Court of Ohio, on the ground that the Probate Judge of Lake County, Ohio and the Chief Justice of the Supreme Court of Ohio, in the course of their official acts in that proceeding, were parties with appellee Barry to a fraudulent conspiracy to deprive appellant of his rights under the Fourteenth Amendment to the Constitution of the United States?" *Brief of Appellee Barry, Sixth Circuit*, page 12.

ent Barry does this petitioner and his cause an honor because Justice Holmes sees his law as the petitioner sees it. The New York Times, August 21, 1927, on page 19, quotes Justice Holmes. In his statement as there quoted, Justice Holmes makes a distinction as to what the *Sacco and Vanzetti* case did not involve, and he did this so as to distinguish that case from a proceeding which would be absolutely void, while in the instant cause it is the petitioner's contention that the respondent Judge Pollock's conduct in these proceedings was such as to make the entire proceedings void in the Ohio courts. See *Chessman v. Teets*, 350 U. S. 3 (1955), and compare as to the alternative jurisdictional grounds in the 754 page Bill of Exceptions herein which, as is pointed out in the complaint (9a-10a), could have been automatically waived as a record to be considered by the Ohio Supreme Court, this through appointment of a fiduciary who then could have been joined to the suit, and then consider the respondent Judge Pollock's denial of a fiduciary to the estate in view of the Ohio statute providing for the appointment as a matter of right. The language of Justice Holmes compares almost exactly to the allegations of the complaint filed by the petitioner in the District Court, and it may be noted that his language as quoted in the footnote below[2] compares exactly to the fourth and fifth questions of the

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[2] Justice Holmes in distinguishing what the *Sacco and Vanzetti* case did not involve states:

> "It is asked how it would be if the Judge were subsequently shown to have been corruptly interested or insane. I will not attempt to decide at what point a judgment might be held to be absolutely void on these grounds * * *." New York Times, August 21, 1927.

Then compare the entire statement of Justice Holmes with the questions presented by petitioner. Also compare with *Chessman v. Teets*, 350 U. S. 3 (1955).

petitioner (See Petition for Certiorari, pp. 2 and 3) and presents additional reason for allowance of certiorari.

Relative to *Sutton v. English*, 246 U. S. 199 (1918), the respondent Barry has now contrived a new argument. Because that case interpreted local law in a probate case so as to deny District Court jurisdiction in a diversity of citizenship case, the respondent Barry now argues that the due process clause of the Fourteenth Amendment has absolutely no application to a probate case and thereby endeavors to justify the decision of the court below. The effect is to carry an argument to the sublime in the logical process, because it is to say that for a Probate Court to deny life, liberty and property to a litigant is a permissible practice and the Fourteenth Amendment does not comprehend such exception. The very argument presents additional reason for allowance of certiorari.

IV.

The respondent Barry endeavors to argue against certiorari on the basis of 163 Ohio St. 124. The answer to that contention is *Chessman v. Teets*, 350 U. S. 3 (1955), wherein this Court has held that an interference with the appellate processes denies due process of law under circumstances such as constitute fraud. Such interference was present in this case, and it was fraudulent and corrupt in motive. As is pointed out in the Petition for Certiorari (See pp. 8 and 9 thereof), there were two alternative grounds of decision in the 754 page Bill of Exceptions. The two alternative grounds related to the 1930 and 1937 frauds in the estate (See Petition for Certiorari, p. 14). These alternative grounds were not considered by the Ohio Supreme Court as a record before it. A fiduciary in the estate could have waived the printing of a record in the

Ohio Supreme Court so that the 754 page Bill of Exceptions, and the evidence of the 1930 and 1937 jurisdictional facts, would have become the record to be considered by that court. Nevertheless, the fiduciary was denied to the estate as the result of the respondent Judge Pollock's participation in the conspiracy charged in the complaint.[*] The very charge of fraud raises in the District Court a federal question, and inasmuch as that fraud involves a State Judge and his place in a federal system, the importance of this case is such that it should receive almost an automatic acceptance on certiorari.

V.

In conclusion, the petitioner makes a passing comment on the respondent Barry's quotation of that part of the journal entry of resignation which is contained in her brief. The very use by her of a part of a journal entry, and the part that was used, quite apparently evidences the respondent Judge Pollock's motive and purpose in filing it. To answer the part of the journal entry which she quotes is merely to raise the question as to why the respondent Judge Pollock had to resign. As among the reasons, the following can briefly set forth: (1) a six day hearing and a 754 page Bill of Exceptions; (2) a letter by respondent

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[*] Even as to that part of 163 Ohio St. 124 which the Ohio Supreme Court decided there is considerable question. Compare *In re Estate of Miller*, 160 Ohio St. 529, and then consider that the remedy of *Johnson v. Johnson*, 51 Ohio St. 446, 38 N. E. 61 (1894), was transferred to the probate courts by amendment of the probate statutes in 1932.

In this connection, it is to be noted that the respondent Barry has never denied the existence of the application for continuance which was forwarded, registered mail, return receipt, to the Ohio Supreme Court for filing and which was never filed. Not only does this constitute interference with appellate processes, but also it is an indication that due process is not to be had in Ohio whatever the remedy.

Barry's counsel quoting the respondent Judge Pollock as to the existence of an estate; (3) his efforts to "kill" and to "bury" a 754 page Bill of Exceptions; (4) his antedating of findings of fact; (5) his statement to the effect that "he didn't intend to get caught"; (6) personal discourtesies to litigants; (7) failure to appoint a fiduciary in the estate pending appeal; (8) violation of a Mandate through his refusal to appoint a fiduciary; (9) failure to take action to protect the disputed assets pending outcome of the litigation in the Ohio Supreme Court (1a-34a). The last time in the respondent Judge Pollock's court, when the petitioner filed his application asking for a revision of the journal entry of resignation (19a-21a), the respondent Judge Pollock stated that there would never be a hearing in his Probate Court on it (51a, Appendix Record).[1] This petitioner now wants in a District Court of the United States a hearing on the face of a complaint which, as the Petition for Certiorari points out, the District Court has held states a cause of action on the due process aspect of the case. This interpretation of the District Court's decision is not denied by the respondent Barry, and that is why the respondent Judge Pollock does not want a hearing on the prejudice and conspiracy.

Respectfully submitted,

JAMES F. SEXTON,

Attorney for Petitioner.

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[1] That remark incidentally has a very special significance in view of the subsequent Supreme Court decision and the charge of collusion against the respondent Justice Weygandt.

APPENDIX D.

Excerpt from Cleveland Press, August 4, 1956.

Court Refuses to Shift Miller Marital Tangle

The quadrangle marital affair mother today received a stinging courtroom rebuke from Chief Justice Carl V. Weygandt of the Ohio Supreme Court.

Weygandt dismissed the claim of Mrs. Marjorie Miller, 36, that Chief Justice Samuel H. Silbert of the Cuyahoga County Common Pleas Court was "biased and prejudiced" against her because he termed her "brazen and bold."

Mrs. Miller got the original verbal slap for leaving her husband, Jerome Miller, 40; her four daughters, and her home at 21314 Kenwood Ave., Rocky River, to take up residence with Russell Dimond, 39, at 2765 Walters Rd., Westlake.

Mrs. Elizabeth Dimond, who remained in the Westlake home, had sued Mrs. Miller for $75,000 for alienation of affections.

Dimond accompanied Mrs. Miller to Lakeside Courthouse this morning. The pair ignored Miller, who was also present, and Mrs. Charlotte Smith, Mrs. Miller's foster mother, who is now caring for her daughters.

JEROME MILLER attended prejudice hearing held in connection with divorce action. His wife, Marjorie, was rebuked.

Addresses Mrs. Miller

Weygandt, after hearing two hours of testimony, addressed Mrs. Miller.

"I'm going to speak directly to you," he said.

"You have challenged the fairness and impartiality of a judge. I suppose you feel that the judge used strong language when he said you were 'brazen and bold.'

"But when the judge found that you—the mother of four children — have left these youngsters and consorted with a married man, and admit constant misconduct—should the judge ignore these facts?

"The primary consideration shown by Judge Silbert for the care of your children was proper.

Commends Silbert

"It is my duty as chief justice to commend him for what he did.

"I am finding no difficulty in deciding that he should not be unbenched."

Judge Silbert was called to the witness stand by Weygandt when attorneys for the Millers failed to summon him.

He said he could preside impartially at trial of Miller's suit for divorce, set for next Wednesday, although he had told Mrs. Miller she would "get no consideration from this court unless you remain in your home and be a good wife and mother."

"Gave Offense"

"I said she could not carry on openly and notoriously, because her conduct gave offense to public decency and morals," Silbert testified.

"I felt that, as a married woman, she had to do something to enrich the marriage. If she leaves her home and children and lives in the same house with another man, she is not entitled to have the court grant her support."

Miller, a trailer court operator, is suing for divorce. Mrs. Miller is asking a property settlement and custody of the children.

Mrs. Miller left the courthouse with Dimond after the legal rebuff.